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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner,

v.

WALTER BACHOWSKI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO

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BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO

United Steelworkers of America, AFL-CIO ("USWA") is a party herein pursuant to this Court's Rule 21(4).[1] USWA agrees with petitioner that the decision below is wrong and should be reversed.

Because petitioner's brief will set forth the opinions below, jurisdiction, question presented, statutes involved, and statement of the case, we shall refrain from duplicating

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[1] USWA was a co-defendant with the Secretary of Labor in the district court, and was an appellee in the court below.

that effort. Our brief will focus upon the error of the decision below as seen from the special vantage point of a union whose elections are regulated by Title IV.

ARGUMENT

Introduction and Summary

The issue in this case is whether the Secretary of Labor's decision not to file an action under Title IV of the LMRDA, based upon his finding that there is not probable cause to believe there were violations which may have affected the outcome of a union election, is subject to judicial review under the Administrative Procedure Act. USWA, in agreement with the Secretary, contends that the Secretary's decision falls within the exception to judicial review articulated in 5 U.S.C. §701(a)(1), i.e., that the LMRDA precludes judicial review. Additionally, USWA believes that the contrary holding of the court below collides with well-established Constitutional principles.

In Part I, we show that Congress conferred exclusive enforcement authority upon the Secretary, deliberately rejecting proposals which would have vested some power of suit initiation in union members; that this Court's decision in *Trbovich* v. *Mine Workers,* 404 U.S. 528 (1972), conclusively establishes that in light of that Congressional plan the Secretary's decision not to sue cannot be judicially challenged; and that to permit such challenges would undermine interests which Congress deemed paramount. Cf. *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (decision whether or not to issue unfair labor practice complaints is committed to the "unreviewable discretion" of the NLRB's General Counsel).

In Part II, we show that judicial review is inappropriate for another reason, i.e., that it would contravene Articles II and III of the Constitution. This is so for two reasons: (1) The decision whether to institute litigation to enforce federal law is one which Article II vests exclusively in the

Executive branch. For the judiciary to direct the Executive to bring cases to it would violate the doctrine of separation of powers. (2) The remedy sought, should a court determine that the Secretary's failure to sue was arbitrary and capricious, is an order directing the Secretary to institute a Title IV action against the union. But as the Secretary and the union both agree that Title IV does not require a new election, there would be no adversity of interest between the plaintiff and defendant in such a suit, and thus no "case" or "controversy" as required by Article III of the Constitution.

I. THE LMRDA PRECLUDES JUDICIAL REVIEW OF THE SECRETARY OF LABOR'S DECISION THAT "PROBABLE CAUSE" DOES NOT EXIST FOR BRINGING A TITLE IV ACTION. TO HOLD OTHERWISE WOULD UNDERMINE INTERESTS WHICH CONGRESS DEEMED PARAMOUNT.

There can be no doubt that Congress intended that only the Secretary of Labor, and not losing candidates, would be authorized to sue to enforce Title IV. Section 402, 29 U.S.C. §482, creates a cause of action in the Secretary alone. Section 403, 29 U.S.C. §483, makes "suit by the Secretary the 'exclusive' post-election remedy for a violation of Title IV. This Court has held that §403 prohibits union members from initiating a private suit to set aside an election. *Calhoon* v. *Harvey,* 379 U.S. 134, 140 (1964)." *Trbovich* v. *Mine Workers,* 404 U.S. 528, 531 (1972).

Congress had before it competing bills, some of which would have authorized union members to sue to enforce Title IV, but in final conference the two houses opted for the Senate's approach, which vested exclusive enforcement authority in the Secretary. *Trbovich, supra,* 404 U.S. at 533-536; *Wirtz* v. *Glass Bottle Blowers,* 389 U.S. 463, 473 (1968); *Calhoon, supra,* 379 U.S. at 140. "It is apparent that Congress decided to utilize the special knowledge and

discretion of the Secretary of Labor in order best to serve the public interest." *Calhoon, supra,* 379 U.S. at 140.

The present case is controlled by *Trbovich*. Trbovich sought to assert, as intervenor, two grounds for setting aside the Mine Workers' election, in addition to the grounds advanced by the Secretary. His brief to this Court described these two grounds at length, and although the phrase "arbitrary and capricious" was not used in characterizing the Secretary's failure to assert them, the brief left no doubt that he believed the failure to be a gross act of misfeasance by the Secretary.[2] This Court did *not* hold that Trbovich would be entitled to have these grounds asserted if he could establish that the Secretary's failure to do so was arbitrary and capricious. Rather, this Court held flatly that the Secretary's decision not to assert them was dispositive, 404 U.S. at 536, 537:

> "[T]he legislative history supports the conclusion that Congress intended to prevent members from pressing claims *not thought meritorious by the Secretary* . . . .
>
> * * * * *
>
> These are claims that the Secretary has presumably determined to be without merit. Hence, to require the union to respond to these claims would be to circumvent the screening function assigned to the Secretary. We recognize that it is less burdensome for the union to respond to new claims in the context of the pending suit than it would be to respond to a new and independent complaint. *Nevertheless, we think Congress intended to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary of Labor.*" (Emphasis added.)

The present case is, of course, *a fortiorari* from *Trbovich,* for here there is not a "pending suit," and the effect of

[2] See Brief for Petitioner in *Trbovich,* pp. 12-19, 40, 42-43.

plaintiff's efforts, if successful, would be to subject the union "to a new and independent complaint."

In upholding this suit, the court below relied upon precedents outside the labor field. That reliance is misplaced, for the Congressional path to enactment of labor legislation is unique. As this Court has said of both the LMRDA and the National Labor Relations Act, each is "the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Wirtz* v. *Glass Bottle Blowers,* 389 U.S. 463, 468 (1968); *cf. National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U.S. 612, 619 (1967). Thus the question whether labor legislation precludes judicial review is not one which can be answered by analogies from non-labor fields.

It *is* appropriate, however, to look for guidance to the NLRA, for this Court has already recognized that the enforcement schemes of the NLRA and Title IV of the LMRDA are "analogous", *Wirtz* v. *Laborers' Union,* 389 U.S. 477, 483 (1968), a judgment in which counsel for respondent concurs.[3] In *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967), this Court held that the decision whether or not to

[3] In his brief for the petitioner in *Trbovich,* p. 38, n. 17, counsel for the respondent herein noted the "striking parallel between the NLRA enforcement mechanism for remedying unfair labor practices, and the enforcement scheme under Title IV of the LMRDA." To be sure, that brief went on to argue that the Secretary of Labor's decision not to bring a Title IV action is reviewable, but only by drawing the wrong analogy. Instead of comparing the Secretary's role under Title IV to that of the NLRB's General Counsel in deciding whether to issue unfair labor practice complaints, the brief compared the Secretary's role to that of the NLRB in deciding to seek enforcement after it has rendered a decision on the merits following full adjudication. *Ibid,* and text thereat. Even then, the brief failed to justify its implicit assumption that judicial review is available over an NLRB decision not to institute enforcement proceedings in the courts of appeals.

issue unfair labor practice complaints is committed to the "unreviewable discretion" of the NLRB's General Counsel."[3a]

What we have said thus far is, we believe, sufficient to demonstrate the incorrectness of the decision below. That conclusion becomes even more obvious, however, upon examination of the ways in which the decision below would undermine interests which Congress deemed paramount.

The potential impact of the decision below must be assessed with a realization that the judicial door there opened is likely to have many entrants. While there will be few cases in which a losing candidate could entertain any realistic hope of overturning the Secretary's decision as "arbitrary and capricious," there are other reasons why such a suit will seem attractive. The realities of union politics being what they are, a defeated candidate often looks for dramatic ways to launch his *next* compaign for union office. Filing a lawsuit contending that he was "robbed" in the last election is a highly effective campaign technique, one which is likely to garner considerable publicity and secure media dissemination of his unproved allegations of election misconduct.

The potential effects thus must be evaluated on the assumption that such suits will be numerous.[4] In two important respects, the decision below undermines objectives which Congress sought to achieve: it puts unions to the burden of defending lawsuits deemed unmeritorious by the Secretary, and it casts a cloud over incumbents' titles to office.

1. The Burden of Defense

As this Court has recognized, one of Congress' objectives in giving the Secretary exclusive enforcement authority was

[3a] Cf. *Calhoon, supra,* at p. 140, where this Court analogized the Secretary's "discretion" to that of the NLRB as articulated in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 263, 242 (1949).

[4] Of the four complaints relating to the Steelworkers' 1973 election which the Secretary found unmeritorious, two have resulted in member suits challenging the Secretary's finding as arbitrary and capricious. In addition to the instant case, see *Valenta* v. *Brennan,* Civ. Ac. No. C-74-11 (N.D. Ohio, Eastern Div.).

"to protect unions from frivolous litigation and unnecessary judicial interference with their elections." *Trbovich, supra,* 404 U.S. at 532. While at first blush it might seem that the decision below poses little threat to these interests, as the suit can be structured so that the member and the Secretary are the only parties,[5] a closer look demonstrates the fallacy of this analysis. In reality the union *must* participate in the member's suit against the Secretary, intervening for that purpose if it is not named as a defendant originally. For the member's suit will always be the critical litigation stage. If the member prevails in that suit, he will obtain a judicial declaration that the Secretary's conclusion that there were not serious violations was not only wrong, but so wrong as to be "arbitrary and capricious." The Secretary will then be required to institute an action against the union in that same court. Realistically, what chance would the union have at that stage to vindicate its election? The election's demise would be virtually a foregone conclusion.

The decision below effectively reinstates the member's right to bring Title IV actions which Congress so clearly opted to deny. Every losing candidate in every election will have the right to bring such an action. The only difference will be a greater burden of proof: he will have to demonstrate that the Secretary's conclusion is arbitrary and capricious. But the mechanics of the suit—discovery, trial, and the consequent drain upon the union treasury—will be the same.[6]

The further steps in the instant litigation, following the issuance of the decision below (which was not stayed), confirm this analysis. The Secretary submitted a statement

[5] But *cf.* the instant case, wherein the plaintiff named the union as a defendant.

[6] Indeed, if the union persists in defending the Secretary's suit after a court has ordered it brought, the drain on the union treasury will have been doubled.

explaining at length why he had concluded that there were not violations which may have affected the outcome. Plaintiff's counsel thereupon notified defendants that this statement "is totally inadequate" and that he intends "to take the deposition of various persons from the Labor Department in an effort to properly place before the Court all of the facts involved." Obviously, the parties will fully litigate this case just as they would have had Congress directly conferred the right to sue upon union members.

2. The Cloud on the Incumbent's Title to Office

Congress was acutely sensitive to the danger that Title IV might create instability in union governance. In shaping Title IV's enforcement machinery, one of Congress' objectives was "to settle as quickly as practicable the cloud on the incumbents' title to office . . ." *Wirtz* v. *Bottle Blowers Association,* 389 U.S. 463, 468-469, n. 7 (1968). Congress recognized that uncertainty as to union leadership "may keep a union in a state of turmoil and could result in instability in collective bargaining relationships with employers", S. Rep. No. 187, 86 Cong., 1st Sess. (1959), p. 22; and it feared that the resultant "internal problems" might lead to "tensions with the surrounding community," *id.,* p. 5.[7]

The decision below will both broaden and lengthen the clouds over title to union office. It will broaden them by multiplying the number of union officers whose elections are cast in doubt by the pendency of litigation. It will lengthen them because the candidate's suit, which will not be filed until after the Secretary has completed his investi-

[7] The Senate Report cautioned that "time is of the essence" in settling Title IV disputes. S. Rep. No. 187, 86th Cong., 1st Sess. 21 (1959). To that end, Congress specified time limits both for the filing of members' complaints with the Secretary, 29 U.S.C. §482(a), and for the institution of lawsuits by the Secretary when he finds such complaints meritorious, 29 U.S.C. §482(b).

gation and decided not to sue, will come later and, because of its two-lawsuit path to ultimate resolution, last longer.

The divergence between Congress' objectives and the results likely to flow from the decision below is thus further evidence that the decision below is erroneous.

II. JUDICIAL REVIEW OF THE SECRETARY'S DECISION NOT TO BRING A TITLE IV ACTION WOULD CONTRAVENE ARTICLES II AND III OF THE CONSTITUTION.

A wholly separate reason why the decision below must be reversed is that Articles II and III of the Constitution do not countenance a court order requiring the executive branch, against its wishes, to institute a lawsuit in federal court. Article II vests in the executive branch the final responsibility for determining what court actions will be brought to enforce federal law, and thus a judicial direction that such an action be brought would violate the separation of powers. Moreover, because the Secretary agrees with the union that Title IV does not require a new election, the lawsuit would be one lacking the requisite adversity of interest to constitute a "case" or "controversy" as required by Article III.

1. Separation of Powers

We are aware of no case, and the decision below cites none, in which an executive branch decision not to institute court proceedings has been held reviewable under the APA.[8] That absence is not accidental. Whenever such review has been sought, the courts have declared that to do so would contravene the separation of powers.

[8] The court below cited *Adams* v. *Richardson,* 480 F. 2d 1159 (D.C. Cir., 1973), as a case in which a Government official's refusal to enforce a statute was held reviewable. But in *Adams* the method of enforcement which HEW was ordered to pursue was an internal administrative proceeding, and the Court emphasized that what it was directing was a "process which . . . will . . . pass beyond the District Court's continuing control and supervision," *Id.* at 1163, n. 5. The *Adams* court accordingly had no occasion to discuss constitutional inhibitions upon its power to direct the filing of a lawsuit.

Article II, Section 3 of the Constitution charges the President of the United States with the duty to "take care that the laws be faithfully executed. . . ." For a federal court to direct the executive branch to file a lawsuit which it did not wish to bring would usurp executive authority. This principle was explained by the Chief Justice (then a Judge on the Court of Appeals) in *Newman* v. *United States,* 382 F.2d 479, 482, n. 9 (D.C. Cir. 1967):

> "The concurring opinion would reserve judicial power to review 'irrational' decisions of the prosecutor. We do our assigned task of appellate review best if we stay within our limits, recognizing that we are neither omnipotent so as to have our mandates run without limit, nor omniscient so as to be able to direct all branches of government. The Constitution places on the Executive the duty to see that the 'laws are faithfully executed' and the responsibility must reside with that power."

The *Newman* court recognized that an executive decision not to institute suit "is subject to abuse or misuse just as is judicial discretion." *id.* at 482, but it concluded that the sanction for such abuse rests not with the judiciary, but in the President's power to supervise and discipline his subordinates, *ibid.*[9]

The court below distinguished these decisions because they involved the enforcement of criminal laws. The court concluded that the Secretary lacks the "prosecutorial discretion" enjoyed by the executive branch in its enforcement of criminal laws. While that conclusion may be incorrect,[10] we assume *arguendo* that the Secretary's discretion *is* more limited, i.e., that he does not have discretion, as a prosecutor does, to refrain from bringing enforcement proceedings when he finds probable cause to believe that a valid lawsuit exists. Even on that assumption, the constitutional implications remain the same. There can be no more direct invasion of the doctrine of separation of powers than the judiciary's compelling the executive to bring cases before it for decision. The court would become both prosecutor and judge, deciding what allegations are to be asserted in the complaint and then passing judgment upon the merit of those allegations.

[9] Accord: *Inmates of Attica Correctional Facility* v. *Rockefeller,* 477 F.2d 375, 379-380 (2nd Cir., 1973); *Peek* v. *Mitchell,* 419 F.2d 575, 577 (6th Cir., 1970); *Smith* v. *United States,* 375 F.2d 243, 247 (5th Cir., 1967), cert. denied, 389 U.S. 841, (1967); *United States* v. *Cox,* 342 F.2d 167, 171 (5th Cir., 1965); *Goldberg* v. *Hoffman,* 225 F.2d 463, 464-465 (7th Cir., 1955).

At the very least, the decision whether to institute a Title IV action depends upon the exercise of a variety of judgmental factors: assessing the facts and evaluating whether there is sufficient evidence to establish a violation, predicting the resolution of difficult questions of statutory interpretation, and assessing whether violations may have affected the outcome of the election. As to all of these, "Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." *Calhoon, supra,* 379 U.S. at 140. Article

[10] The court below relied upon the literal language of Section 402, which states that when the Secretary finds probable cause he "shall" institute a lawsuit. But the cases are legion in which courts have concluded that the word "shall" does not preclude the normal exercise of discretion. See, e.g., *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944); *Inmates of Attica Correctional Facility* v. *Rockefeller,* 477 F.2d 375, 381 (2nd Cir. 1973), and cases cited thereat. This Court has characterized the very statutory provision in the LMRDA upon which the court below relied as meaning that the Secretary, upon finding probable cause, "*may* file suit." *Calhoon, supra,* 379 U.S. at 140. See also *Wirtz* v. *Hotel Employees,* 391 U.S. 492, 498 (1968) ("Congress . . . settled enforcement authority on the Secretary of Labor to insure that *serious* violations would not go unremedied"); *Wirtz* v. *Glass Bottle Blowers, supra,* 389 U.S. at 468.

II does not permit the judiciary to substitute itself in making these "prosecutorial" decisions.

The incongruity of the decision below is heightened by the additional fact, which we next discuss, that in a lawsuit which the court orders to be brought there will be no adversity of interest between the plaintiff and the defendant, but only between the court and the parties.

2. Adversity of Interest

Respondent seeks a court order compelling the Secretary to institute a Title IV action against the union. But the Secretary, after thorough investigation, has concluded that such a lawsuit would be without merit. If respondent prevailed, therefore, the consequence would be a second lawsuit in which both the plaintiff (the Secretary) and the defendant (the union) agree that the defendant deserves to win. It takes no citation of authority to recognize that such a suit would not meet the Constitution's "case or controversy" requirement: there would be no adversity between the parties.[11]

Of course, if the losing candidate were to intervene in the suit which the Secretary was ordered to file against the union, he could supply the adversity of interest which is lacking between the original parties. But that would not cure the Article III defect. Adversity must exist between the original parties. That lacking, the suit must be dismissed, *United States* v. *Johnson,* 319 U.S. 302 (1943),[12] and the putative intervenor must avail himself of such independent judicial remedies as he himself possesses. Here,

[11] This is made no less true because the court might reject the positions of both plaintiff and defendant and set the election aside. See, p. 7, *supra.* Adversity between the court and the parties is not the Constitutional touchstone for federal jurisdiction.

[12] In *Johnson,* the plaintiff and defendant agreed that a federal statute was unconstitutional, but the United States intervened in the district court to defend the constitutionality of the statute. Although the intervenor thus supplied the adversity which was lacking between the original parties, the Supreme Court dismissed for want of adversity.

of course, he has none, for Congress intentionally decided that candidates should not be empowered to invoke the jurisdiction of the federal courts to hear such controversies.

All of this demonstrates, in yet another way, that candidates cannot secure by indirection that which Congress denied them directly: a cause of action to enforce Title IV.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and this Court should remand with instructions that the complaint be dismissed for failure to state a claim.

Respectfully submitted,

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Cf. Hart & Wechsler, *The Federal Courts and the Federal System* (1st Ed. 1953), page 116, note 1. This was but one application of the general rule that "intervention will not serve as a means of conferring real jurisdiction." 3B Moore's Federal Practice (2nd Ed. 1974), Par. 24.16[2], page 24-612 and n. 6 thereat. It has been held that where jurisdiction is lacking between the original parties a court has "discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims [of] the intervenor." *Fuller* v. *Volk,* 351 F.2d 323, 328-329 (3rd Cr., 1965). Such discretion exists, however, only "in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction." *Ibid.* Union members, of course, do not have a "separate and independent basis" for challenging union elections under Title IV. *Calhoon, supra; Trbovich, supra.* Thus their intervention in a non-adversary Title IV action would not cure the jurisdictional defect.